No. 88-299

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of service member listed as missing in action; and JERRY L. DENNIS, brother of service member lost in Southeast Asia,

Petitioners,

v.

RONALD REAGAN, President of the United States; CASPAR WEINBERGER, United States Secretary of Defense; GEORGE SCHULTZ, United States Secretary of State; JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency; and each of their respective predecessors and successors, in their official capacity,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether petitioners' challenge and allegation that the respondents or their predecessors and successors have obstructed the mandate of the Hostage Act and due process clause of the Fifth Amendment of the United States Constitution presents a justiciable political question?

II. Whether the Fifth Amendment and the Hostage Act of 1868 create a private right of action to allow petitioners to challenge whether the respondents have circumvented with the provisions of the due process clause of the Fifth Amendment or the Hostage Act of 1868?

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at Smith, et al v. Reagan, et al, 844 F.2d 195 (4th Cir. 1988) and is printed in Appendix C hereto, infra, p. 53.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was decided on April 18, 1988 (Appendix C, infra, p. 53). Petitioners' Petition for Rehearing to the United States Court of Appeals for the Fourth Circuit with Suggestion for Rehearing In Banc was denied on May 18, 1988. Appendix D, infra, p. 82). The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The provisions of the Hostage Act, Title 22, United States Code, Section 1732 provide:

> Release of citizens imprisoned by foreign governments. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty, by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, that the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to the Congress.

The Fifth Amendment of the United States Constitution provides in part that:

> No person... shall... be deprived of life, liberty, or property without due process of law....

STATEMENT OF CASE

Petitioners alleged in a two count class action complaint filed on September 4, 1985 and amended on September 25, 1985 that the respondents and their respective predecessors or successors in their official capacity failed to comply with the provisions of the due process clause of the Fifth Amendment of the United States Constitution and the provisions of Title 22, United States Code, Section 1732 (hereinafter referred to as the "Hostage Act") by concealing the true facts concerning American serviceman being held following the Vietnam conflict. The basis for federal jurisdiction in the Court of first instance cited by petitioners was Title 28, United States Code, Section 1361 and 1331. The petitioners alleged in

their verified complaint that the respondents failed to comply with the provisions of the Hostage Act by (1) failing to demand of the governments of Vietnam, Cambodia and Laos the reasons why members of plaintiffs' class were being unjustly deprived of their liberty, (2) by failing to determine whether such deprivation was wrongful and in violation of the rights of American citizenship, (3) by failing to demand the release of such members of plaintiff's class, (4) by failing to use such means, not amounting to acts of war, as the President of the United States deemed necessary and proper to obtain the release of plaintiffs' class and alternatively that (5) the respondents intentionally failed to make known to the President of the United States that members of plaintiffs' class were being unjustly deprived of their liberty by foreign governments and that (6) the

respondents intentionally carried out a continuing course of intelligence gathering methods designed or intended to disprove (rather than prove), discredit, and ignore factual information which substantiated the existence of plaintiffs' class, and that (7) the respondents intentionally "negotiated away" the liberty and repatriation to the United States of members of plaintiffs' class.

Petitioners alleged in their verified complaint that their class consisted of all living American prisoners of the conflict between the United States and the Republic of Vietnam currently being held in captivity by the foreign governments of Vietnam, Cambodia, Laos or other foreign governments. Petitioners further alleged that the respondents (or their representatives) possessed and have since 1973 been provided substantial information relating to and confirming the presence of

living American prisoners of war in Southeast Asia, and that once such information was communicated to the respondents, that little, if anything, was done and that the respondents have since approximately 1973 embarked upon a continuing official or unofficial policy or course of conduct designed or intended to discredit and disprove the existence of living American prisoners in Southeast Asia. Petitioners allege that as early as May, 1973 that it was known to the respondents (or their predecessors) that American prisoners of the Vietnam conflict were in fact being held as hostages well after 1973 when official repatriation activities came to a close.

Petitioners in their amended complaint alleged (as surviving family members of Americans missing in action from the Vietnam war) that the respondents (or their respective representatives)

failed to comply with the provisions of the Hostage Act by misleading the petitioners intentionally or through neglect concerning the factual circumstances surrounding the status of their respective family members while missing in action and concerning the correct identification of the remains of the petitioners' respective family members. Petitioners alleged further in their complaint that the respondents, utilized such misinformation and misidentification to prevent, hinder and impede compliance with the due process clause of the Fifth Amendment of the United States Constitution as well as the Hostage Act. Petitioners sought relief in the nature of mandamus and declaratory judgment. Pursuant to the provisions of Rule 17 of the Federal Rules of Civil Procedure, the commencement of petitioners' cause of action was ratified

by eighteen other family members of Americans still missing in action from the United States conflict with Vietnam.

On or about January 28, 1973, the United States entered into an agreement on ending the military conflict in Vietnam. However, approximately 2,400 Americans, both servicemen and civilians, still remain missing, including petitioners' family members. Petitioner Hart is the wife of LTC Thomas Hart, III, an American serviceman shot down over Laos on or about December 21, 1972. Petitioner Shelton is the wife of Colonel Charles E. Shelton, currently the sole remaining official United States prisoner of war from the Vietnam conflict. Petitioner Fanning is the wife of Major Hugh Fanning, United States Marine Corps, shot down over North Vietnam on or about October 31, 1967 and petitioner Dennis is the brother of Mark Dennis, United States Navy, declared

killed in action on or about July 15, 1966. Petitioners Hart, Fanning and Dennis have received the purported remains of their family member from the respondents and all three petitioners have concluded, based upon forensic data, that the remains provided to them were not in fact the remains of their respective family member. Petitioner Smith was a former active duty United States Army officer, former American prisoner of war held in Cambodia and (immediately prior to the commencement of petitioners' civil action) was the commander of a United States Army Special Forces Detachment in Southeast Asia, during which assignment petitioner Smith and petitioner McIntire received intelligence reports and other information substantiating that American prisoners of war were being held in captivity in Southeast Asia between 1981 and 1984. Petitioner Smith alleges in his

verified complaint that despite the receipt of such information that he was instructed by the respondents or their representatives to destroy such information.

Despite the overwhelming evidence that American servicemen are still being held in Southeast Asia as prisoners of war following the Vietnam conflict (much of which is included in petitioners' joint appendix filed with the United States Court of Appeals for the Fourth Circuit) the respondents or their successors or representatives have taken the position since 1973 either that there are no American prisoners of war still remaining in Southeast Asia, or in the alternative that the respondents or their representatives are unable to prove the existence of any single American still being held as a prisoner of war.

In November 1985 respondents moved to dismiss petitioners' action arguing that the case presented a nonjusticiable political question, that dismissal was required in that there was no express or implied private right of action under the Hostage Act, and that petitioners Smith and McIntire lacked the necessary representative capacity and should be dismissed as parties to the litigation. On June 19, 1986, respondents' motions were allowed in part and denied in part. The District Court ruled that although petitioners' mandamus action should be dismissed, that the separation of powers doctrine compels the judiciary to exercise jurisdiction over questions which are exclusively judicial in nature, that the federal courts are not required under the separation of powers doctrine to avoid their constitutional responsibility in the exercise of their appropriate power and

that the petitioners' complaint raised issues of fact over the existence of American servicemen missing in action in Southeast Asia and hence alleged issues which were within the subject matter jurisdiction of federal courts to enter a declaratory judgment. Smith, et al v. Reagan, et al, 637 F.Supp. 964, 967, 968 (E.D.N.C. 1986).

Respondents' motion to reconsider was denied after oral arguments but respondents were allowed interlocutory appeal. Upon rehearing, the district court held that the respondents' claim of power to become the sole judges of facts involved in the question of foreign affairs exceeded the respondents' constitutional authority and that the authority to resolve questions of fact raised in the context of litigation arising under the Constitution or laws of the United States was vested in the

judicial branch and therefore the political question doctrine did not bar the court from exercising jurisdiction to enter declaratory relief as to the existence of American servicemen declared missing in action in Southeast Asia. Smith, et al v. Reagan, et al, 663 F.Supp. 692, 695, 696. The district court also held that the Hostage Act gave an implied cause of action to petitioners. Smith, supra at 696.

Interlocutory appeal to the United States Court of Appeals for the Fourth Circuit was granted and arguments were held on February 2, 1988. Smith, et. al. v. Reagan, et. al., 844 F.2d 195 (4th Cir. 1988). The Court of Appeals held that petitioners declaratory judgment action presented a nonjusticiable controversy and that the Hostage Act failed to create any implied right of action in favor of petitioners.

REASONS FOR GRANTING WRIT

Whether petitioners' challenge and claim that the respondents have obstructed the mandate of the Hostage Act and Fifth Amendment of the United States Constitution presents a justiciable political question?

The Fourth Circuit Court of Appeals has rendered a decision in the immediate case in conflict with the decisions of other federal courts of appeals and decisions of the Supreme Court of the United States. The political question doctrine does not justify the courts' avoiding their constitutional responsibility in the exercise of their appropriate power. Powell v. McCormack, 395 U.S. 486, 548-49 (1969); U. S. v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Not every suit that touches on foreign relations is beyond judicial cognizance. Baker v. Carr, 369 U.S. 186, 211.

The Seventh Circuit in Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985) held that the Hostage Act did create a reviewable duty in the President to inquire into allegations of the improper foreign imprisonment of American citizens. Flynn, supra at 1193. The Seventh Circuit in Flynn has clearly held that it was proper for the judicial branch of government to consider whether executive action violated the provisions of the United States Constitution and the Hostage Act. Flynn, supra at 1190-91.

The Fifth Circuit in Redpath v. Kissinger, 415 F.Supp. 566 (W.D.Tex.) affm'd, 545 F.2d 1167 (5th Cir. 1976) also held that the question of Hostage Act enforcement by the executive branch is not barred by the political question doctrine. Moreover, the legislative history of the Hostage Act establishes a duty of the

executive branch to act to cause the repatriation of Americans unlawfully detained by foreign governments. See the full text of the Hostage Act set forth at Appendix D, p. 82. Whether, as petitioners contend, American servicemen are being held in Southeast Asia is a question of fact capable of adjudication by the federal courts. To dismiss petitioners' litigation as a non-justiciable political question will deny petitioners any forum to test the truth of the facts asserted by the respondents as to the existence of American servicemen being held as prisoners of war and would allow respondents to be the sole judges of the facts involved in executing the Hostage Act. See also Mikva and Neuman, "The Hostage Crisis and the Hostage Act," 49 Univ. Chicago L. Rev., 292 (1982).

II. Whether the Fifth Amendment and the Hostage Act of 1868 create a private right of action to allow petitioners to challenge whether

> the respondents have intentionally circumvented or otherwise failed to comply with the provisions of the due process clause of the Fifth Amendment and the Hostage Act?

The Fourth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other federal courts of appeals and the decisions of the United States Supreme Court. In Cort v. Ash, 422 U.S. 66 (1975), this Honorable Court held that when "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." Id at 82. There is nothing in the Act or in its legislative history to suggest an "explicit purpose to deny such a cause of action." Smith, et al v. Reagan, et al, 663 F.Supp. 692, 696 (E.D.N.C. 1987). The United States Court

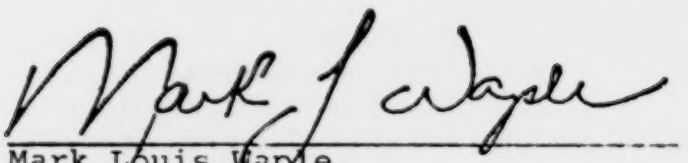
of Appeals for the Seventh Circuit has held that "the language and the legislative history of the Hostage Act convince us that Congress placed a judicially enforceable duty on the Executive to inquire into the circumstances of an American citizen's extended detention abroad." Flynn v. Schultz, 748 F.2d 1186, 1195 (7th Cir. 1984). As to the petitioners right to enforce their Fifth Amendment due process claim, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

CONCLUSION

The jurisdiction of this Honorable Court is properly envoked. This petition presents significant as well as novel substantial federal questions of exceptional importance requiring plenary consideration, with briefs on the merits and oral argument. The writ of certiorari

prayed for by petitioners should issue forthwith.

Dated, this the 12th day of August, 1988.



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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

Petitioners,

v.

RONALD REAGAN, President of the United States; CASPAR WEINBERGER, United States Secretary of Defense; GEORGE SCHULTZ, United States Secretary of State; JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency; and each of their respective predecessors and successors, in their official capacity,

Respondents.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
No. 85-119-CIV-3

MARK A. SMITH, et al, Plaintiffs	)	
v.	)	ORDER
RONALD REAGAN, President of the United States, et al, Defendants	)	

This is a suit to compel the President of the United States and his principal military and foreign affairs officers to engage in conduct with foreign governments pursuant to the Hostage Act of 1868, 22 U.S.C. Section 1732.

Some of the plaintiffs are active and reserve United States armed forces personnel, others are the immediate family members of United States armed forces personnel who are declared missing in action as a result of the United States military action in Indochina during the 1960's and 70's. The plaintiffs also

allege a class of persons who are the members of the United States armed forces unaccounted for in Southeast Asia and declared by the United States government as missing in action.

Plaintiffs seek mandamus from this court ordering the President to conduct foreign relations with various countries in Southeast Asia to further pursue official inquiries about the existence and status of Americans missing in action. The plaintiffs claim the right to this relief under the Hostage Act. The plaintiffs also ask this court to declare that the class of armed forces personnel designated as missing in action enjoy the protection of the United States Constitution and laws.

The defendants answer these claims with a motion to dismiss on assorted grounds. The defendants claim: that the complaint presents a non-justiciable

political question; that there is no private right of action under the Hostage Act; that plaintiffs are not entitled to mandamus relief when the duties to be performed entail the exercise of discretion; and that prudential reasons require the court to deny relief within its discretion pursuant to the Declaratory Judgment Act, 28 U.S.C. Section 2201.

I

Because the plaintiffs' claim for mandamus does not present a case or controversy under the meaning of that phrase in Article III of the United States Constitution, this court lacks jurisdiction over that subject matter and the defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure must be allowed.

The courts of the United States have only that limited subject matter jurisdiction that is conferred by the

Constitution, law and treaties of the United States. An examination of the court's subject matter jurisdiction must precede any inquiry by the court into the merits of a case.

Historically the United States Supreme Court has recognized an area of political questions which are inappropriate for judicial handling. The doctrine is based upon the principle of the separation of powers between the coordinate branches of government. This doctrine allows the judiciary to exercise the self-restraint necessary to avoid an intrusion into an area within the exclusive jurisdiction of a partner branch of the government. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-166 (1803); Baker v. Carr, 369 U.S. 186 (1962); Laird v. Tatum, 408 U.S. 1, 15 (1972).

In Baker the Supreme Court, in its most comprehensive articulation of the

political question doctrine, outlined the factors to determine whether the resolution of a matter violates the separation of powers principle:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

369 U.S. at 217. See Sanchez-Espinoza v. Reagan, 568 F.Supp. 596, 599 (D.D.C. 1983).

The Supreme Court has also held that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280 (1981). This is true because matters involving foreign affairs are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harrisades v. Shaughnessy, 342 U.S. 580, 589 (1950).

The court finds that the claim for mandamus directly involves foreign policy decisions and falls squarely under the category of political questions outlined in Baker which involve "potential judicial interference with executive discretion in the foreign affairs field" and which "seek to dictate foreign policy." Crockett v. Reagan, 588 F.Supp. 893, 898 (D.D.C. 1982); Flynn v. Shultz, 748 F.2d 1186,

1191 (7th Cir. 1984). At the core of the plaintiffs' mandamus claim under the Hostage Act is the contention that these defendants, and their predecessors in office for several administrations, have not exercised the full mandate of the Hostage Act. It is well settled that the conduct of foreign affairs is textually committed by the Constitution to the Executive Branch. E.G., Haig v. Agee, supra; Oetjen v. Central Leather Company, 246 U.S. 297, 302 (1918). Further, the "President is exclusively responsible" for the "conduct of diplomatic and foreign affairs." Johnson v. Eisentrager, 339 U.S. 763, 789 (1950). Moreover, it has been specifically held that the "repatriation, or an accounting of, American soldiers... is vested exclusively in the Executive and Legislative Branches of the Government." Dumas v. President of the United States, 554 F.Supp. 10, 17 (D.

Conn. 1982). This circuit has recently spoken with precision on the separation of powers doctrine is it bears on the relationship between the courts and the executive involving a different but analogous executive power. Tozer v. LTV Corporation, No. 84-1907(L), slip op. (4th Cir. May 27, 1986).

If the merits were reached on this claim, the court would have to decide whether defendants' foreign policy decisions and efforts are adequate and justifiable, and if not, what remedial actions are appropriate. These areas are reserved for the Executive and Legislative Branches of our Government. they are beyond the legitimate authority of the court. There are no judicially discernable and manageable standards to resolve the issues raised by this claim. Baker v. Carr, supra at 217.

Since the claim for mandamus is not a case or controversy, the court is without subject matter jurisdiction. The court must end its inquiry at this threshold without reaching any of the merits of this claim.

II

The plaintiffs' claim for declaratory judgment does not invoke separation of powers considerations which result in the political question bar to subject matter jurisdiction. Quite a contrary result is produced by an analysis of declaratory judgment relief. If material facts are in contest between the plaintiffs and defendants arising out of a federal statutory right, then the courts of the United States are the proper place to adjudicate those contested facts.

Article III, Section 1 of the United States Constitution specifically vests the courts of the United States with the

exclusive judicial power that arises under the Constitution. The separation of powers doctrine will bar the judiciary from interfering in matters which are exclusively Executive and Legislative. These are political questions. That same doctrine, however, compels the judiciary to exercise jurisdiction over questions which are exclusively judicial in nature. The separation of powers doctrine arises out of the delicate balance created by the Constitution. By expressly separating the three branches and creating our tri-partite system of government, the framers implicitly constructed the dynamic that has come to be known as the separation of powers doctrine. The courts have often recognized that this doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate

branch of government. Baker v. Carr, supra at 217. The doctrine, however, cannot justify the courts' avoiding their constitutional responsibility in the exercise of their appropriate power. See Powell v. McCormack, 395 U.S. 486, 548-49 (1969). The determination of contested facts between adverse parties which arise under a grant of federal law is a matter peculiarly within the judicial power of the United States courts.

To the extent that plaintiffs and defendants contest material issues of fact arising out of rights derived from the United States Constitution and law, this court does have subject matter jurisdiction to determine those issues of fact and enter a declaratory judgment.

In their complaint the plaintiffs request that the court enter a declaratory judgment to the effect that the members of the plaintiffs' class (assumably the

alleged class of missing in action armed forces personnel) enjoy the full protection and benefit of the Fifth Amendment of the United States Constitution and the Hostage Act, 22 U.S.C. Section 1732. Whether such persons exist, and therefore may come within the scope of the Hostage Act is a question of fact, if properly raised, for decision by the court.

The government argues that the Hostage Act does not impose duties upon the President until it has been made known to him that such a group (hostages) exists. The government further argues that the discovery of the existence of such a group is a matter within the exclusive jurisdiction of the executive. The government claims that the court is barred by political question considerations from entertaining any inquiry into the existence of the alleged

group of persons. If there is a contested issue of fact over the existence of such persons, then the government finds itself claiming dual power. It claims the executive power to exclusively administer and execute the government and laws of the United States. This is a legitimate claim. It also claims the exclusive power to determine the facts that it will use in administering the government and executing the law as it applies to this class of persons. This claim of power is in excess of the government's legitimate executive authority.

The government, in argument, suggests that there may be no factual dispute between these parties regarding the existence of members of the alleged class of plaintiffs. It is premature at this stage of the declaratory judgment action to determine if an issue of fact will exist for declaratory judgment. Because

the issues have not yet been joined by the pleadings, the court will reserve the exercise of its discretion to determine whether the declaratory judgment action should be dismissed for providential reasons.

This court is mindful of its limitations in dealing with issues that touch on the core powers of a coordinate branch of government. Likewise the court is mindful of its obligation to accept the exercise of judicial power under the United States Constitution where parties seek relief and have the right to the exercise of the judicial power of the United States.

The parties thus far have accepted the Hostage Act without constitutional criticism. The court will not initiate such an examination of the Act. However, it is manifest that the same separation of powers considerations discussed in the

treatment by the court of the plaintiffs' mandamus claim would be relevant to a discussion of the constitutionality of the Hostage Act itself.

Finally, the court has examined the claims of Mark A. Smith and Melvin G. McIntire for declaratory judgment and finds these plaintiffs to be without standing to proceed. As such, the court lacks subject matter jurisdiction over the claims of the plaintiffs Smith and McIntire, and the declaratory judgment action is dismissed as to them.

For the reasons outlined in this opinion, the defendants' motion to dismiss the plaintiffs' claim for mandamus relief under the Hostage Act, 22 U.S.C. Section 1732, for lack of subject matter jurisdiction is ALLOWED. The defendants' motion to dismiss the plaintiffs' action for declaratory judgment pursuant to Rule 12(b)(1) of the Federal Rules of Civil

Procedure is DENIED.

SO ORDERED this 19th day of June, 1986.

TERRENCE W. BOYLE
UNITED STATES DISTRICT
COURT JUDGE

No. _____

IN THE
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OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

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APPENDIX B

UNITED STATES DISTRICT COURT JUDGE
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No. 85-119-CIV-3

MARK A. SMITH, et al, Plaintiffs	)	
v.	)	ORDER
RONALD REAGAN, President of the United States, et al, Defendants	)	

This action was brought pursuant to the Hostage Act of 1868, 22 U.S.C. Section 1732 (the Hostage Act), and the Fifth Amendment to the United States Constitution. The original plaintiffs were active and reserve personnel of the United States Armed Forces. The case has been dismissed as to those plaintiffs. Subsequent plaintiffs are members of the immediate families of certain United States servicemen who were declared missing in action in Southeast Asia during the 1960's and 1970's. The plaintiffs also allege a class of persons who are

deemed by the United States Government to be missing in action in Southeast Asia.

Initially, the plaintiffs petitioned this court for two kinds of relief. First, the plaintiffs sought a writ of mandamus ordering the President to pursue official inquiries as to the existence and current status of those missing in action. Second, the plaintiffs requested the court to declare that American servicemen alleged to be missing in Southeast Asia "enjoy the full protection and benefit of the United States Constitution and the Hostage Act, 22 U.S.C. Section 1732." The defendants moved to dismiss the complaint on the following grounds: (1) that the subject matter of the complaint raises a nonjusticiable political question; (2) that the Hostage Act creates no private right of action; (3) that the duties imposed on the President by the Hostage Act, if any, entail the exercise of

discretion and are therefore an inappropriate subject for mandamus; (4) and that prudential reasons counsel against the granting of declaratory relief.

In a previous order, this court dismissed the mandamus count holding that the conduct of foreign affairs is textually committed by the United States Constitution to the President and therefore the court lacks subject matter jurisdiction under 22 U.S.C. Section 1732 to issue a writ of mandamus. With respect to the plaintiffs' request for declaratory relief, however, the court found that it possessed subject matter jurisdiction to determine issues of fact and to enter a declaratory judgment. Thus, the court denied the motion to dismiss as it applied to the declaratory judgment action. Smith v. Reagan, 637 F.Supp. 964 (E.D.N.C. 1986).

The defendants have now moved that the court reconsider its assertation of jurisdiction over the declaratory judgment action. In the alternative, the defendants move the court to certify the order denying the motion to dismiss the declaratory judgment claim to the Court of Appeals for interlocutory appeal. The court has reviewed all of the briefs, oral argument and factual material submitted by the parties on this motion and concludes that there is subject matter jurisdiction in this court to determine the issues of fact that may exist between these parties involving the existence of American servicemen declared missing in action in Southeast Asia and to afford declaratory judgment, if appropriate, on factual issues that may arise.

I

The defendants in their motion to reconsider argue that the claim for

declaratory judgment presents a nonjusticiable political question; that there is no private right of action under the Hostage Act; and that prudential reasons require the court to deny relief within its discretion pursuant to the Declaratory Judgment Act, 28 U.S.C. Section 2201.

In their complaint, the plaintiffs request that declaratory judgment be entered "to the effect that members of the plaintiffs' class enjoy the full protection and benefit of the Fifth Amendment of the United States Constitution and the Hostage Act, 22 U.S.C. Section 1732." At the heart of the declaratory judgment action is the question of whether living American servicemen, who were declared missing in action or prisoners of war in Southeast Asia during the 1960's and 1970's, continue to be held captive by unfriendly

governments and political sovereignties in Southeast Asia, including Vietnam, Laos and Cambodia. The plaintiffs allege that such a class exists and therefore falls within the scope of the Hostage Act. This allegation, if joined as a contested issue by the pleadings, presents a question of fact for decision by the court.

The defendants argue that the political question doctrine bars a federal court from asserting jurisdiction to inquire into the Executive Department's administration of foreign affairs. This interpretation of the doctrine would deny to parties like these plaintiffs any judicial forum to test the truth of the facts asserted by the executive in administering United States law. The defendants, in effect, would become the sole judges of the facts involved in executing the law merely because the contested facts involved a question of

foreign affairs. [1] This claim of power is in excess of the constitutional authority vested in the executive branch. The authority to resolve questions of fact raised in the context of a lawsuit arising under the constitution or laws of the United States is vested in the judicial branch of our government. While the separation of powers doctrine calls for the exercise of judicial restraint when the issues involve the resolution of questions committed by the text of the Constitution to a coordinate branch of government, the doctrine cannot justify the courts' avoiding their constitutional

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1. The courts most properly invoke the political question doctrine in situations where the political process provides effective redress for the plaintiffs' grievance. The policial process to which the public has recourse in the paradigm political question case has failed to afford relief to the plaintiffs here. Indeed, this is precisely the core of the plaintiffs' claim: that despite over a decade of

responsibility in the exercise of their appropriate power. Powell v. McCormick, 395 U.S. 486, 549 (1969(. See also United States v. Brown, 381 U.S. 437, 462 (1965); Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring).

> Notwithstanding the deference each branch must accord the others, the "judicial "power of the United States" vested in the federal courts by Article III, Section 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress shall share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of the separation of powers and the checks and balances that flow from the scheme of a tripartite

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hearings and investigation of this issue by Congress and despite numerous petitions to the President and executive departments, there has been a deliberate strategy on the part of the Executive Branch, the defense agencies and the government intelligence agencies to conceal what plaintiffs allege to be the true facts.

> government. The Federalist, No. 47, p.313 (S. Mittell ed., 1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

United States v. Nixon, 418 U.S. 683, 704-05 (1974).

The court is mindful of its limitations in dealing with issues that touch upon the core powers of the executive branch. The President is "exclusively responsible for the conduct of foreign affairs." Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (emphasis added). It is clear, however, that in designing our Government by dividing and allocating the sovereign power among three separate, but equal, branches "the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."

United States v. Nixon, 418 U.S. at 707. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. at 635 (Jackson, J., concurring).

To read the Article II powers of the executive branch as vesting the exclusive authority to determine the facts that it will use in administering the government and executing the laws of the United States as it applies to the alleged class of persons in this case "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III." United States v. Nixon, 418 U.S. at 707.

The court also notes that the Declaratory Judgment Act, 28 U.S.C. Section 2201, provides that a district court may "declare the rights... of any interested party... whether or not further relief is or could be sought." The availability of declaratory relief depends on whether there is a live dispute between the parties, Powell v. McCormick, 395 U.S. at 518, and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. Id. See also Golden v. Zwickler, 394 U.S. 103 (1969); United Public Workers v. Mitchell, 330 U.S. 75, 93 (1945). Because there is a live dispute between the parties in the case at bar, this court finds that in terms of the general criteria of justiciability, this case is justiciable.

The defendants' contention that the plaintiffs do not have a private right of

action under the Hostage Act is also without merit. In Cort v. Ash, 422 U.S. 66 (1975), the United States Supreme Court held that when "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." Id. at 82 (emphasis by the Court). The Hostage Act, at issue in this case, reads in pertinent part:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty, by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment... demand the release of such citizen, and if the release so demanded is unreasonably delayed, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release....

It is apparent from the reading of this Act that it creates a class of citizens, i.e., American citizens held captive by foreign governments, and that this class has certain rights under the Act. The Act mandates that it shall be the duty of the President and that the President shall use such means to obtain or effectuate the release of the hostages. Further, the plaintiffs are the appropriate representatives of the class. There is nothing in the Act or in its legislative history to suggest an "explicit purpose to deny such a cause of action." Moreover, in Dames & Moore v. Regan, 453 U.S. 654 (1982), the Supreme Court, in considering the Hostage ACt, stated that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be

considered to 'invite' 'measures on independent presidential responsibility.'" Id at 678, citing Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. at 637. The United States Court of Appeals for the Seventh Circuit recently held that "the language and the legislative history of the Hostage Act convince us that Congress placed a judicially enforceable duty on the Executive to inquire into the circumstances of an American citizen's extended detention abroad." Flynn v. Shultz, 748 F.2d 1186, 1195 (7th Cir. 1984) (emphasis added). See also Redpath v. Kissinger, 415 F.Supp. 566 (W.D. Texas, 1976). Accordingly, the court finds that there is an implied cause of action under the Hostage Act.

As this court stated in its previous order, it is premature at this stage of the declaratory judgment action to determine if an issue of fact will exist

for declaratory judgment. The factual issues, if any, have yet to be joined by the pleadings. As such, the court will continue to reserve the exercise of its discretion to determine whether the declaratory judgment action should be dismissed for providential reasons.

II

The defendants also move in the alternative that this court's order be certified for immediate appeal to the United States Court of Appeals for the Fourth Circuit. Title 28 of the United States Code, Section 1292(b) provides that when a district judge finds that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal may materially advance the termination of the litigation," such order should be certified to the Court of Appeals for interlocutory review.

The court has carefully reviewed the defendants' motion to certify and finds that it is meritorious. The political question doctrine is founded upon the constitutional principle of separation of powers and has been recognized and applied since its conception in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803). Certification of this dispositive question may materially advance the ultimate termination of this lawsuit in that it will address the question of the court's jurisdiction, and the legal sufficiency of the complaint. The defendants' position that the evidence necessary to decide the factual issue of whether there are live prisoners of war would, at least in part, involve classified intelligence and military information presents an even more compelling reason for certification of this court's previous order.

Upon the foregoing, the court hereby ORDERS that the defendants' motion for reconsideration is DENIED. It is FURTHER ORDERED that the defendants' alternate motion for certification of this court's previous order denying the defendants' motion to dismiss the declaratory judgment claim for interlocutory appeal is ALLOWED.

This 23rd day of June, 1987.

TERRENCE W. BOYLE
UNITED STATES DISTRICT COURT JUDGE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

Petitioners,

v.

RONALD REAGAN, President of the United States; CASPAR WEINBERGER, United States Secretary of Defense; GEORGE SCHULTZ, United States Secretary of State; JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency; and each of their respective predecessors and successors, in their official capacity,

Respondents.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1661

MARK A. SMITH, Former United States Prisoner of War;
MELVIN C. MCINTIRE, Sergeant First Class, United States Army;
ANNE M. HART, Wife of service member listed as missing in action;
DOROTHY M. SHELTON, Wife of existing Prisoner of War;
KATHERYN FANNING, Wife of service member listed as missing in action;
JERRY L. DENNIS, Brother of service member lost in Southeast Asia,
Plaintiffs-Appellees

versus

RONALD REAGAN, President of the United States;
CASPAR WEINBERGER, United States Secretary of Defense
GEORGE SCHULTZ, United States Secretary of State;
JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency;
and each of their respective predecessors and successors in, in their official capacity,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Terrence W. Boyle, District Judge. (CA-85-119-3).

Argued: February 2, 1988
Decided: April 18, 1988

Before WILKINSON, Circuit Judge, BUTZNER, Senior Circuit Judge, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Mark Bernard Stern, Appellate Staff, Civil Division, Department of Justice (Richard K. Willard, Assistant Attorney General; Samuel T. Curran, United States Attorney; Michael Jay Singer, Appellate Staff, Civil Division, Department of Justice on brief) for Appellants; Mark Louis Waple (Hutchens & Waple on brief) for Appellees.

WILKINSON, Circuit Judge:

This suit was brought under what has come to be known as the Hostage Act, 22 U.S.C. Section 1732 (1982). Plaintiffs sought a declaration that American prisoners of the Vietnam War continue to be held in captivity by the governments of Vietnam, Laos and Cambodia, that those prisoners "enjoy the full protection and

benefit" of the Hostage Act, and "that the Defendants shall comply" with the Act's requirements. They also sought a writ of mandamus compelling the President to comply with the Hostage Act.

Defendants moved to dismiss the case for lack of subject matter jurisdiction, contending that the suit raises a nonjusticiable political question. The district court granted the motion with respect to the claim for mandamus, but denied it with respect to the claim for declaratory relief. It then granted defendants' motion for an interlocutory appeal. Because the suit raises a nonjusticiable political question, and because the Hostage Act does not create a private right of action, we reverse and remand with instructions to the district court to dismiss this suit.

I

In January, 1973, the United States

entered into an agreement, generally known as the Paris Accords, on ending the Vietnam War. This agreement provided for the return of service personnel held captive by all parties to the conflict. the Paris Accords also called for the parties to assist each other in obtaining a full accounting of personnel missing in action.

Despite the formal end of the hostilities, however, and despite the signing of the Paris Accords, the families of American service personnel still listed as missing in action after the Vietnam War (MIAs) continue to live with the possibility that these men remain alive and in captivity in a foreign land. The families of some men listed as killed in action have likewise been haunted by reports that loved ones whom they thought dead remain alive and captive.

These families have labored for years to obtain an accounting of missing

servicemen and the release of any who may remain captive. The National League of Families has monitored negotiations on this issue between the United States and the governments of Southeast Asia. It has endeavored to focus public attention on the problem and, in some cases, has worked with the various governments in attempting to resolve it.

The efforts of the United States government to obtain an accounting began prior to the fall of South Vietnam in 1975 and have continued since then. Those efforts have been extensive. The POW/MIA Interagency Group, whose members include State and Defense Department personnel, staff members of the National Security Council, representatives of the Joint Chiefs of Staff, staff members of the House and Senate Foreign Affairs and Foreign Relations Committees, and members of the National League of Families,

coordinates U.S. efforts to secure an accounting of missing personnel and the release of any personnel still in captivity. Congressional delegations and missions from the Departments of Defense and State have met with the Vietnamese on this issue. The United States Defense Intelligence Agency (D(A) evaluates reports of POW/MIA sightings. congress also oversees attempts to account for U.S. personnel, both through committee hearings and through the efforts of the House Task Force on American Prisoners & Missing in Southeast Asia.

The Hostage Act states, in pertinent part:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful

> and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release....

22 U.S.C. Section 1732.

This suit was brought under the Act by a former Army prisoner of the Vietnam War and an active Army Sergeant, who were joined an ultimately replaced as plaintiffs by relatives of American personnel lost or missing in southeast Asia. It was brought on behalf of a class of "all living American Prisoners of the [Vietnam War] currently being held in captivity by the foreign governments of Vietnam, Cambodia, Laos or other foreign government" against the President, the Secretaries of Defense and State, and the Director of the DIA. Plaintiffs sought a writ of mandamus compelling defendants to

comply with the terms of the Hostage Act, and a declaration that the plaintiff class exists and enjoys the protection of the Hostage Act.

Defendants argued that the suit poses a nonjusticiable political question and moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion with respect to the mandamus claim, ruling that the claim "directly involves foreign policy decisions and falls squarely under the category of political questions... which involve 'political judicial interference with executive discretion in the foreign affairs field' and which 'seek to dictate foreign policy.'" Smith v. Reagan, 637 F.Supp. 964, 967 (E.D.N.C. 1986).

The district court denied appellants' motion to dismiss the declaratory judgment claim. The court held that the question whether the plaintiff class exists, and

whether its members are protected by the Constitution and the Hostage Act, did not raise a nonjusticiable political question, but only a question of fact "arising out of rights derived from the United States Constitution and law." Id. at 968. When defendants moved the court to reconsider its judgment, the court affirmed its earlier ruling, but granted defendants' motion to certify the court's order for interlocutory appeal. Smith v. Reagan, 663 F.Supp. 692 (E.D.N.C. 1987).

II

Plaintiffs would have this court declare that they "enjoy the full protection and benefit of the [Hostage Act] and further that the defendants shall comply with such statutory provisions." They thus ask the courts to determine whether American service personnel remain in captivity in southeast Asia and to assess the adequacy of the executive's

efforts to secure the release of any who do. Either course of action is fraught with peril for the judiciary. In order to grant the relief requested, the courts would be asked to intrude in the conduct of sensitive diplomatic negotiations. Furthermore, they would be asked to make determination of fact in an area where the judiciary lacks power to obtain information, and in which it has neither expertise to evaluate the information brought before it nor standards to guide its review. Finally, as different courts address these issues, the judiciary may speak with multiple voices in an area where it is imperative that the nation speak as one. These difficulties lead us to conclude that his suit presents a nonjusticiable political question.

"In determining whether a question falls within [the political question] category, the appropriateness under our

system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Baker v. Carr, 369 U.S. 186, 210 (1962) (quoting Coleman v. Miller, 307 U.S. 433, 454-55) (1939)). The boundaries of the political question doctrine have never been marked with precision, but the Supreme Court's discussion of the doctrine in Baker v. Carr has provided much useful guidance. In Baker, the Court listed several factors, the presence of any one of which may render an issue a nonjusticiable political question. This case presents a textbook example of at least two of those factors, a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and

manageable standards for resolving it." Baker, 369 U.S. at 217.

A.

Plaintiff seek in this suit to investigate and evaluate the executive branch's conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review. In Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948), the Supreme Court stated:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the

> domain of political power not subject to judicial intrusion or inquiry.

See also Haig v. Agee, 453 U.S. 280, 292 (1981); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

Not every suit that touches on foreign relations is beyond judicial cognizance. Baker, 369 U.S. at 211. A cause of action under the Hostage Act, however, would inescapably involve courts in matters of the most delicate diplomacy. A charge that a foreign government has "unjustly deprived" an American citizen of liberty is likely to have far-reaching and unforeseeable effects on the conduct of foreign relations. Similarly, the adequacy of actions taken under the Hostage Act to secure the release of such a citizen is likely to be difficult to assess and the success of those action difficult to predict. Congress therefore gave great discretion to the President in

making, or refraining from making, such a charge and in choosing the actions to be taken after such a charge is made. The Act fails to define the term "unjustly deprived," suggesting that "Congress seems to have contemplated that the President would make a subjective judgment." Flynn v. Schultz, 748 F.2d 1186, 1193 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985). It directs the President to take the actions he deems "necessary and proper" after concluding that there has been an unjust deprivation of liberty. The Act's vagueness suggests that congress intended the President to exercise broad discretion, and intended to foreclose "traditional judicial review" in this area. Id. The courts, unschooled in "the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict," Holtzman v. Schlesinger, 484 F.2d 1307,

1312 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974), must leave these sensitive determinations where the text of the Constitution and the terms of the Hostage Act both place them -- with the political branches of our government.

Courts considering suits to compel executive action under the Hostage Act have consistently held that the substance of such action is unreviewable. In Flynn, the court did find that the Act creates a reviewable duty in the President to inquire into allegations of the improper foreign imprisonment of an American citizen. 748 F.2d at 1193. It went on to hold, however, that "[w]hile it might be appropriate for a court to order such an inquiry... review of the substance of the inquiry and subsequent decision clearly presents a nonjusticiable political question." Id. See also Redpath v. Kissinger, 415 F.Supp. 566, 568-69 (W.D.

Tex.), aff'd, 545 F.2d 167 (5th Cir. 1976). Plaintiffs do not allege that the President has failed to look into allegations that American servicemen remain captive in southeast Asia; indeed, their documentary evidence consists largely of reports on MIAs compiled by the executive branch. Rather, plaintiffs ask the courts to conduct an independent inquiry into the status of the servicemen. In so doing, the courts would be undertaking a task which Congress has explicitly assigned to the executive.

Plaintiffs would simply place too many actors on the diplomatic stage. The Supreme Court noted in Baker that issues involving foreign relations often pose political questions because, in part, they "uniquely demand single-voiced statement of the Government's view." 369 U.S. at 211. The status of these servicemen has been the subject of negotiations between

the United States and the governments of southeast Asia for over a decade. It is important that this country speak with a single, clear voice in these negotiations. Pronouncements by the federal courts may differ sharply from those of the executive, and might themselves not be consistent. Although this suit purports to include within the class all living POWs and MIAs, we can hardly be certain that a decision here would foreclose future adjudication of the issue by different parties or on different theories. The resulting cacophony would necessarily hamper United States negotiators. It might prove a significant hindrance to diplomatic efforts to effectuate the release of any Americans who may still be in captivity. These considerations combine to convince us that the issues plaintiffs seek to litigate are so "vitally and intricately interwoven

with contemporaneous policies in regard to the conduct of foreign relations" as to be "exclusively entrusted to the political branches of government [and] immune from judicial inquiry or interference." Harisiades, 342 U.S. at 588-89.

B.

Any court disposed to entertain this action would encounter formidable obstacles. The "lack of judicially discoverable and manageable standards for resolving" the issues reinforces our view that this case presents a nonjusticiable political question. Baker, 369 U.S. at 217. Furthermore, the courts face intractable difficulties in gathering relevant information, and lack the expertise to evaluate what information would be put before them.

The Hostage Act is broad and open-ended. Neither the statutory language nor the legislative history give

any indication of the meaning of the term "unjustly deprived," which triggers executive duties under the Act. See Flynn, 748 F.2d at 1193. Once the President has concluded that an American citizen has been "unjustly deprived" of liberty, he must determine whether the deprivation is "wrongful" and whether release, once demanded, is "unreasonably delayed or refused," and must "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of that citizen. Each of these nebulous directives vests extraordinary discretion in the executive. See Redpath, 415 F.Supp. at 569 ("official actions [contemplated by the Act] are not ministerial, but are clearly of a diplomatic nature involving the exercise of discretion by the Executive"). Accountability lies in oversight by

Congress or in criticism from the electorate, but not in the judgments of the courts. The Hostage Act sets the terms of political debate, not the standards of adjudication. The adversary process here is more political than litigious. See Mikva & Newman, The Hostage Crisis and the "Hostage Act," 49 U. Chi. L. Rev. 292, 341 (1982) (the Act gives the President "room for discretion" but his actions are "subject to oversight by Congress").

The courts also lack the powers for the task which plaintiffs would have them undertake. The political branches have worked for years, since the end of American involvement in hostilities in southeast Asia, to obtain a full accounting of missing Americans from foreign governments. The courts, which lack even the limited tools of diplomatic leverage, are unlikely to be more

successful in obtaining information from those governments. Further, the courts lack the expertise to evaluate what information would be laid before them. Much of the evidence proffered by plaintiffs consists of intelligence reports, with which courts are inexpert and unfamiliar. In the end, evaluation of this information requires not so much the application of law as the exercise of judgment. That judgment should be made by the political branches of our government.

C.

This suit also raises the question of whether there exists the power to award plaintiffs any meaningful remedy. A declaration that defendants "shall comply" with the Hostage Act would be the functional equivalent of a writ of mandamus. See Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C.Cir. 1985) (where federal officers are defendants,

declaratory relief is "the practical equivalent of specific relief such as an injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court"). The courts would be precluded from issuing such a declaration for the same reasons which caused the district court to decline to issue a writ of mandamus: such a declaration would "seek to dictate foreign policy." Smith v. Reagan, 637 F.Supp. at 967. A declaration that the court had found, by a preponderance of the evidence, that the plaintiff class exists would afford plaintiffs little real relief. The judiciary cannot oversee the conduct of foreign relations, and could not order the President to take specific action to obtain the release of any American it declared to be the object of a wrongful detention.

The Act itself prescribes no remedy for presidential noncompliance and courts would be hard-pressed to devise their own. Holding the President in contempt for insufficient efforts on behalf of Americans held abroad is hardly realistic. Without the prospect of that sanction, the status of equitable relief becomes little more than advisory. The remedy, as we have noted, must come through the political process. Indeed, our polity assumes that elected officials will lend their ears to sympathetic pleas and worthy cases.

III.

Even if the issues raised by this suit were justiciable, the suit must be dismissed. The Hostage Act does not create an explicit private right of action, and we decline to infer one.

In determing whether an otherwise silent federal statute implicitly creates

a private right of action, our "focal point" must be congressional intent. Thompson v. Thompson, 108 S.Ct. 513, 516 (1988). See also Transamerica Mortgage Advisors, Inc.. (TAMA v. Lewis, 444 U.S. 11, 24 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979). "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, 451 U.S. 77, 94 (1981). The regulation of access to the courts is largely a legislative task, and one that courts should hesitate to undertake. For this reason, implied rights of action are disfavored, and will not be found in the absence of clear evidence of legislative intent. See Thompson, 108 S.Ct. at

521-22 (Scalia, J., concurring). Because the Hostage Act treads on matters of foreign policy which have long been recognized as the exclusive province of the political branches, we must be especially certain of congressional intent before inferring a private cause of action.

The language of the Hostage Act argues against such an action. The Act calls for congressional review of presidential action taken pursuant to the Hostage Act, requiring that "all the facts and proceedings relative [to such actions] shall as soon as practicable be communicated by the President to Congress." 22 U.S.C. Section 1732. Provision for congressional oversight does not necessarily rule out congressional intent to provide for private enforcement, but it is evidence that Congress set forth with some care the enforcement scheme it

intended to create. The legislative history of the Act indicates further that failure of the President to take actions required by the Hostage Act "is not remediable by the courts, nor, perhaps, even Congress, but solely by the electorate." Flynn, 748 F.2d at 1195. Speaking of the bill that became the Hostage Act, Senator Fessenden stated:

> [We]e can do nothing but declare the principle; and if the Government does not do its duty the people will remedy it, and we must leave the proper remedy to those who have it in their hands.

Cong. Globe, 40th Cong., 2d Session. 4358 (1868).

In determining whether a private right of action is implicit in a federal statute, we must also consider "the contemporary legal context." Cannon v. University of Chicago, 441 U.S. 677, 698-99 (1979). We must "assume that our elected representatives, like other

citizens, know the law," id. at 696-97, and we acknowledge that legislation is informed by "the state of the law at the time the legislation was enacted." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982). The Hostage Act was enacted in 1868, long before the practice of finding implied private rights of action became common. See J.I. Case Co. v. Borak, 377 U.S. 426 (1964). It also antedated the era of widespread resort to the judiciary to compel executive action. The 40th Congress, in enacting the Hostage Act, is likely to have done so with the understanding that it created only those rights of action explicit in the text of the statute, and its failure to provide explicitly for a private right of action is powerful evidence of its intent not to provide one at all.

Finally, plaintiffs argue that a private right of action in their favor should be inferred because they are members of "the class for whose especial benefit the statute was enacted." Cort v. Ash, 422 U.S. 66, 78 (1975) (emphasis in original). Whether or not this is correct, it alone does not enable this court to find such a right. "[T]he mere fact that the statute was designed to protect [certain individuals] does not require the implication of a private cause of action... on their behalf.... The dispositive question remains whether Congress intended to create any such remedy." Transamerica Mortgage Advisors, 444 U.S. at 24. We hold that congress did not so intend.

IV

The desire to account for American service personnel still missing after the Vietnam War runs deep. Such an accounting

would go far in healing the wounds which remain from that difficult chapter in our nation's history. Perhaps more importantly, it would end the anxiety and frustration, if not all of the pain, borne by the families of these servicemen.

We must, however, be mindful of the constraints our Constitution places on the judiciary. Our system of government confines each branch to a limited sphere. No one branch of our government can cure all ills, and institutional hubris is more likely than not to result in new and greater ills. In this suit, plaintiffs ask the courts to intrude in an area in which they have no rightful power and no compass. Congress, in enacting the Hostage Act, appears to have been well aware of the judiciary's limitations. Those limitations embody the strict and binding force of law.

We reverse the judgment of the district court and remand with directions to dismiss this lawsuit.

REVERSED.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

Petitioners,

v.

RONALD REAGAN, President of the United States; CASPAR WEINBERGER, United States Secretary of Defense; GEORGE SCHULTZ, United States Secretary of State; JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency; and each of their respective predecessors and successors, in their official capacity,

Respondents.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1661

Mark S. Smith, etc., et al,

Plaintiffs-Appellees

v.

Ronald Reagan, etc., et al,

Defendants-Appellants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson, with the concurrence of Senior Judge Butzner and Judge Ellis, United States District Judge sitting by designation.

For the Court.

JOHN M. GREACEN
Clerk

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

Petitioners,

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RONALD REAGAN, President of the United States; CASPAR WEINBERGER, United States Secretary of Defense; GEORGE SCHULTZ, United States Secretary of State; JAMES A. WILLIAMS, General, Director of the United States Defense Intelligence Agency; and each of their respective predecessors and successors, in their official capacity,

Respondents.

APPENDIX E

HOSTAGE ACT OF 1868
22 U.S.C., Section 1733

An Act concerning the rights of American citizens in foreign states. (July 27, 1868).

WHEREAS, the right of expatriation is a natural and inherent right of all people, indispensible to the enjoyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle, this government has freely received immigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens with their decendants, are subjects of foreign states, owing allegiance to the government's thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed;

Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, THAT any declaration, instruction, opinion, order or decision of any officers of this government which denies, restricts, impairs or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

Sec. 2. And be it further enacted THAT all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native born citizens in like situations and circumstances.

Sec. 3. And be it further enacted, THAT whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty (emphasis added) of the President forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release do demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Session Laws, Fortieth Congress, 2d Session, Chapter 248, 249 (1868).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARK A. SMITH, Former United States Prisoner of War; MELVIN C. McINTIRE, Sergeant First Class, United States Army; ANNE M. HART, wife of service member listed as missing in action; DOROTHY M. SHELTON, wife of existing prisoner of war; KATHERINE FANNING, wife of servicemember listed as missing in action; and JERRY L. DENNIS, brother of servicemember lost in Southeast Asia,

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Respondents.

APPENDIX F

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 16th day of August, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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No. 88-299

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK A. SMITH, ET AL., PETITIONERS

v.

RONALD REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-299

MARK A. SMITH, ET AL., PETITIONERS

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RONALD REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the actions taken by respondents to determine the whereabouts of American servicemen missing in action in the Vietnam conflict do not constitute full compliance with 22 U.S.C. 1732, which is known as the "Hostage Act."[1] They challenge the holdings of the court of appeals that their claims present nonjusticiable political questions and that the Hostage Act does not provide a private right of action.

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[1] Although Section 1732, which was enacted in 1868, is now commonly referred to as the Hostage Act, this appellation is of recent vintage and has no legal significance. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 & n.7 (1981). "Congress in 1868 was concerned with the activity of certain countries refusing to recognize the citizenship of naturalized Americans traveling abroad, and repatriating such citizens against their will" (*id.* at 676).

1. a. In January 1973, the United States entered into an agreement to end the military conflict in Vietnam. This agreement, generally known as the Paris Accords, provided for the return of those held captive by all parties to the conflict and for a full accounting of those missing in action. Although several hundred Americans were repatriated as a result of the Paris Accords, no accounting was made for approximately 2,500 Americans who were missing in action. Pet. App. 55-56.

Since the withdrawal of American forces from South Vietnam, the Defense Intelligence Agency (DIA), an agency within the Department of Defense, has played the primary role in gathering intelligence information on the existence and physical whereabouts of unaccounted for Americans in Southeast Asia. Since 1980 these efforts and related policy matters have been coordinated by an interagency task force comprised of representatives of the State and Defense Departments, the White House National Security Council, and the Joint Chiefs of Staff, as well as staff members of the House Foreign Affairs Committee and the Senate Foreign Relations Committee and a representative of the National League of POW/MIA Families. In addition to their participation in the interagency task force, both Houses of Congress have exercised continuous oversight of efforts on behalf of MIAs through their respective Subcommittees on Asian and Pacific Affairs. Pet. App. 57-58.

The House has also formed its own bipartisan Task Force on POW/MIAs. In 1984, this Task Force investigated charges of a cover-up of information regarding live prisoners in Southeast Asia. It concluded that there was no government cover-up, a conclusion that was later approved by the House Permanent Select Committee on Intelligence. After reviewing the work performed by the Subcommittee on Asian and Pacific Affairs, the Task Force, and the DIA, the Select Committee on Intelligence

concluded that "both the Task Force and the Subcommittee conduct careful and adequate oversight of POW/MIA matters," and that "DIA performs unbiased, professional, and thorough analyses of POW/MIA live sighting cases." H.R. Rep. 99-260, 99th Cong., 1st Sess. 4 (1985).

b. Petitioners, who are the next of kin of four American servicemen missing in action in Southeast Asia, brought this suit on behalf of a proposed class of "all living American Prisoners of the [Vietnam War] currently being held in captivity" by foreign governments (Pet. App. 59). Petitioners sought a writ of mandamus to compel the President to pursue further official inquiries about the existence and status of Americans missing in action and a declaration that the plaintiff class exists and enjoys the protection of the Hostage Act (*id.* at 21, 60).

Respondents moved to dismiss on the grounds that petitioners' claims present nonjusticiable political questions, that no private right of action may be implied under the Hostage Act, and that plaintiffs had failed to state a claim upon which mandamus or declaratory relief could properly be granted. The district court granted the motion to dismiss with respect to petitioners' claim for mandamus relief, holding that this claim "directly involves foreign policy decisions and falls squarely under the category of political questions outlined in [*Baker* v. *Carr*, 369 U.S. 186 (1962)] which involve 'potential judicial interference with executive discretion in the foreign affairs field' and which 'seek to dictate foreign policy' " (Pet. App. 25 (citation omitted)). The court denied the motion to dismiss with respect to the claim for declaratory relief, however, holding that the resolution of questions as to the existence and status of Americans missing in action involved only questions of fact (*id.* at 30-31).

c. After the district court certified the case for interlocutory appeal pursuant to 28 U.S.C. (& Supp. IV) 1292(b) (Pet. App. 52), the court of appeals reversed and remanded with instructions to dismiss the case in its entirety (*id.* at 53-82). The court held that the claim for declaratory relief fell squarely within the scope of the political question doctrine and was accordingly nonjusticiable. By that claim, the court stated, petitioners asked the court "to determine whether American service personnel remain in captivity in southeast Asia and to assess the adequacy of the executive's efforts to secure the release of any who do" (*id.* at 61-62). The court concluded that such a request "presents a textbook example" of the sort of claim that is barred by the political question doctrine, as there is "a 'textually demonstrable constitutional commitment of the issue to a coordinate political department' and 'a lack of judicially discoverable and manageable standards for resolving it' " (*id.* at 63-64) (quoting *Baker* v. *Carr*, 369 U.S. at 217)).

The court further held that it would not infer a private right of action under the Hostage Act. The court noted that the language of the Act (which is *reprinted in* Pet. App. 85-86) provides no private rights, but instead requires the President to report to Congress "as soon as practicable" as to the efforts taken on behalf of "any citizen of the United States [known to have] been unjustly deprived of his liberty by or under the authority of any foreign government." Moreover, the court added, the Congress that passed Section 1732 believed that any remedy for its violation was in the hands of the electorate. As one Senator stated, "we can do nothing but declare the principle; and if the Government does not do its duty the people will remedy it, and we must leave the proper remedy to those who have it in their hands." Cong. Globe,

40th Cong., 2d Sess. 4358 (1868) (statement of Sen. Fessenden) (quoted at Pet. App. 78). Furthermore, the court stated, the Hostage Act was enacted "long before the practice of finding implied private rights of action became common," so that Congress's "failure to provide explicitly for a private right of action is powerful evidence of its intent not to provide one at all" (Pet. App. 79).

The Fourth Circuit denied petitioners' petition for rehearing with suggestion for rehearing en banc, with no judge dissenting (Pet. App. 83-84).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

a. Petitioners primarily argue (Pet. 14-16) that review is warranted because the court of appeals' holding that their claims are barred by the political question doctrine conflicts with the decisions in *Flynn* v. *Shultz*, 748 F.2d 1186, 1195 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1985), and *Redpath* v. *Kissinger*, 415 F. Supp. 566 (N.D. Tex.), aff'd, 545 F.2d 167 (5th Cir. 1976) (Table). This assertion is incorrect.

In *Flynn*, the court held that it could *not* review the question whether the President had taken "necessary and proper" steps to obtain the release of an American citizen incarcerated in Mexico. The court reasoned that ordering the President to take a particular action to obtain the release of an American citizen held in a foreign country "would impermissibly interfere with the Executive's discretion to conduct foreign affairs and would, consequently, be inconsistent with the political question doctrine" (748 F.2d at 1195). The court similarly held that it was precluded from declaring that the citizen's detention abroad was unjust or in violation of American citizenship (*id.* at

1193-1195). The court in *Flynn* did find that it could consider whether the President had "inquire[d] into the circumstances of [the] American citizen's extended detention abroad" (*id.* at 1195), although it concluded that "[i]n light of the deferential standard of review required in cases touching on foreign affairs, the Executive has already fulfilled any duty of inquiry and report under the Hostage Act" (*id.* at 1197). The duty found reviewable in *Flynn* has no counterpart in the present case, however, because there is no allegation here that the President has failed to look into allegations that servicemen remain captive in southeast Asia, and there is no question that any such captivity would be unlawful (Pet. App. 68).

Similarly, in *Redpath*, the plaintiff also sought to compel Executive Branch action to free an American citizen from detention in Mexico. The court held that "[t]here is no doubt that a District Court has no authority to grant the requested relief by Writ of Mandamus or otherwise" (415 F. Supp. at 567). This holding was based on the court's view that " 'commencement of diplomatic negotiations with a foreign power is completely in the discretion of the President * * *. The Executive is not subject to judicial control or direction in such matters.' " *Id.* at 568 (quoting *United States* v. *Dulles*, 222 F.2d 390, 394 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955)).

Thus, the cases petitioners rely upon do not conflict with the decision below. To the contrary, they support the conclusion that adjudication of petitioners' claims would invoive the court in an unmanageable and standardless inquiry that would inevitably intrude into the heart of the Executive's ability to conduct foreign policy. Accordingly, the court below properly concluded, consistent with the decisions of other courts to consider the issue, that petitioner's claims are not justiciable.

b. Petitioners also challenge the court of appeals' alternative holding that the Hostage Act does not provide a private right of action. Petitioners' assertion (Pet. 16-18) that this holding conflicts with the decisions of other courts is incorrect, since the courts in *Flynn* and *Redpath* did not address the issue whether the Hostage Act created a private right of action.[2] Moreover, the analysis of the court of appeals is fully consistent with this Court's repeated admonitions that, in determining whether a private right of action is to be inferred, the " 'focal point' " of the judicial inquiry must be congressional intent. Pet. App. 76 (quoting *Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4). As the court of appeals observed, the language, legislative history, and contemporary context of the Hostage Act all support the conclu-

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[2] As noted above, the court in *Flynn* did find (748 F.2d at 1195) that it could review the question whether the Executive had inquired into the circumstances of an American citizen's detention abroad, an issue not presented here. However, that court did not expressly consider whether Congress had intended to create a right of action under the Hostage Act. It merely noted its conclusion that the Act created a judicially reviewable duty, and then went on to find that the Executive had fulfilled the duty. It is possible, given that the terms of the Act explicitly require the President to inquire into the reasons for the imprisonment of an American abroad once it has been made known that an American citizen has been detained by a foreign country, that the court was reviewing the Executive's action under the mandamus statute (28 U.S.C. 1361). We note that the Hostage Act does *not* require the President to determine whether any Americans are being held in captivity abroad, so whether the Executive has done so is not reviewable by way of mandamus, which provides for relief "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). Furthermore, as noted, there is no dispute that the Executive *has* attempted to determine whether any Americans are being held hostage in southeast Asia; petitioners seek review only of the adequacy of that effort.

sion that Congress did not intend to permit private enforcement of the Act (Pet. App. 77-80).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

OCTOBER 1988

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